

2015 WL 4620391 (Mass.App.Ct.) (Appellate Brief)  
Appeals Court Of Massachusetts.

Maurice SNEED, as Guardian and Conservator for Evelyn Blount; James  
Beverly; Charmain Beverly Gilliam; and Margaret Odum, Appellants,

v.

James DILDAY, Oscar D. Beverly and Ethel Shepard, Individually and as Trustees  
of Sephus Family Realty Trust and the Sephus Family Irrevocable Trust, Appellees.

No. 2015-P-346.  
2015.

Appeal from the Massachusetts Probate Court

**Appellants' Brief**

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## \*7 STATEMENT OF ISSUES

1. Whether the trial judge's decision was contrary to the weight of the evidence, including substantial medical records and expert testimony.
2. Whether the trial judge failed to conduct the proper burden-shifting tests for testamentary capacity and undue influence.
3. Whether the trial judge erred in awarding attorney's fees based on her opinion that medical records and expert testimony were insufficient evidence, and based on the fact that counsel did not depose a witness prior to trial.

## STATEMENT OF THE CASE

This case concerns whether Bettie Sephus, who died on July 13, 2009, lacked testamentary capacity or was subject to undue influence in March 2008 when she executed estate planning documents (the “Trust documents”) that transferred her entire estate to her brother and two friends, completely disinheriting her older sister, nieces, and nephews. For at least two years before her death, according to medical records and expert testimony, Ms. Sephus suffered from progressive [Alzheimer's dementia](#) which greatly \*8 impaired her memory, understanding and ability to manage her affairs.

Ms. Sephus was part of a close extended family in North Carolina. At all times relevant to this case, she had two living siblings, Cutha “Evelyn” Beverly Blount and Oscar Depriest Beverly;<sup>1</sup> two other siblings, Linwood and Albert, died earlier. TT [2:19] 155. Ms. Sephus did not have any children. Id. Ms. Sephus moved to Boston in 1956, but she remained close to her sister Evelyn, visiting and calling frequently. A 374. The sisters owned a farm together, traveled together, and sent each other flowers and crochet projects. A 373. Ms. Blount's daughter Maurice Sneed, who also lived in Virginia, also maintained a close relationship

with Ms. Sephus, visiting her two or three times every year. A 374; TT [2:26] 162. Maurice lived with Ms. Sephus for two periods in the 1960s while she was working in Boston. A 374.

In July 2007, Mrs. Sephus was diagnosed with [early-onset Alzheimer's disease](#). In May 2008, Mrs. Sephus was admitted to Massachusetts General Hospital suffering from severe [dementia](#). In November 2008, Mrs. \*9 Sephus was admitted to Beth Israel hospital after having been found wandering the streets not knowing where she was. In November 2008, she was admitted to Goddard House, then transferred to Standish Village where, on July 13, 2009, she died.

Maurice is a complainant in this case, as the guardian and conservator of her mother, Ms. Blount. TT [2:18] 154. Albert's children, Margaret Odum, Charmin Gilliam, and James Beverly, are also complainants. TT [2:20] 156. Respondents are the beneficiaries of Ms. Sephus' estate, Ms. Sephus' brother Oscar; a friend, Ethel Shepherd; and Ms. Sephus' friend and former attorney, James Dilday.

Appellants/Complainants filed a complaint in the Probate Court on July 16, 2009. A 11. The case went to trial on October 11, 2011, and the opinion was issued on June 13, 2013. A 364. On October 25, 2013, the trial judge awarded attorney's fees and costs to Appellees/ Respondents, and on October 10, 2014, she set the amount at \$282,899.14 in attorney's fees and \$7,075.02 in costs. A 409, 431. Had the estate proceeded to probate intestate, all of the Appellants/Complainants and Appellee/ Respondent Oscar \*10 Beverly would have had joint [financial](#) interests in the estate.

## STATEMENT OF FACTS

### I. Complainants' Evidence

#### A. Medical Records

Records of Dr. John Muse, Ms. Sephus' primary care physician, first indicate concerns about memory loss on September 26, 2005, when he stated she had a "mild degree of cognitive dysfunction." A 169. On January 11, 2006, Oscar came to Ms. Sephus' appointment and asked questions about her memory loss. A 170. On July 24, 2006, Ms. Sephus was seen for facial swelling, and Dr. Muse wrote "patient may have been accidentally [sic] applying plaster to her face thinking it was a facial powder." A 171. On July 9, 2007, Dr. Muse referred Ms. Sephus to a psychologist because Oscar reported she had been "complaining of hearing voices and seeing things." A 172.

Dr. Gentry first saw Ms. Sephus on July 19, 2007. She saw her again on October 23, 2007, December 18, 2007, April 23, 2008, August 7, 2008 and finally on November 19, 2008. *See* A 103-138. After the first visit, Dr. Gentry wrote that Ms. Sephus "has had one year history of hearing voices and strange beliefs \*11 that people are coming into her home and putting on her clothes... Her niece reports at least a one to two year history of cognitive decline. She is often confused and unable to remember significant events. She often mixes up the past and present, such as referring to her mother as if she is still alive..." A 122. Dr. Gentry performed a Mini Mental Status Exam ("MMSE"), on which Ms. Sephus scored a 14 of 30. A 124, 137. She also noted: "No significant knowledge of current events. Able to name president Bush with significant prompting." *Id.* At that appointment, Dr. Gentry diagnosed Ms. Sephus with Alzheimer's late onset with delusions, and [major depressive disorder](#). *Id.* She also contacted [elder](#) services, out of concern that Ms. Sephus may have been [financially exploited](#).

At the next appointment, on August 21, 2007, Oscar reported that Ms. Sephus was having "occasional visual hallucinations, seeing someone in her room at night. She also at times thinks that what is happening on tv is real." A 120. On October 23, 2007, Dr. Gentry noted that Ms. Sephus was "back to baseline... Memory continues to be poor, no recent decline." A 118.

\*12 On December 13, 2007, before her next visit with Mrs. Sephus, Dr. Gentry wrote a letter "To Whom it May Concern" stating:

Mrs. Sephus has been under my care since July 2007 for the treatment of mild [dementia](#) and depression. Although she does have some impairment of her memory and judgment, I believe that she does have the mental capacity to designate a health care proxy and power of attorney. She also has the capacity to make decisions about her wishes in regard to her estate.

A 117.

After the next visit on December 18, 2007, Dr. Gentry wrote that Ms. Sephus was conducting estate and long term care planning. A 115.

Dr. Gentry did not meet with Ms. Sephus again until after she had executed the Trust documents. On April 23, 2008, Ms. Sephus “reports some recent increase in depressive symptoms and paranoia/ hallucinations. She is fearful that her nephew has moved back into her home and has seen him there on a few occasions. There seems to be no indication that this is actually going on.” A 112.

On the morning of May 17, 2008, Ms. Sephus was admitted to MGH complaining of vertigo and nausea. A 195, 199. During that admission, she was “pulling on clothes... agitated and confused... saying words staff \*13 unable to comprehend.” A 210-11. The next day, Ms. Sephus told a nurse, “I am in Boston at a school.” A 212. Records state that Ms. Sephus “is able to make some needs known however word finding difficulties, unable to report symptoms, or converse logically. History of Alzheimer's at baseline.” A 214. During that hospital stay, she scored an 8 of 30 on the MMSE. A 201. She did not know the date, month, or year; could not draw a clock; and could not spell or count backwards. *Id.*

Admission notes state that “At her functional baseline, according to pt's niece, the patient sits around her home watching television. She does not cook, clean, shop. It is unclear if she is able to bathe herself; she does not let her brother assist her with this.” A 200. Occupational therapists and physical therapists who worked with Ms. Sephus reiterated the concerns about her cognitive abilities. A 216, 218.

On August 7, 2008, at an appointment with Dr. Gentry, Ms. Sephus' mood was stable and she was experiencing less paranoia. A 108. At the final visit, November 19, 2008, Dr. Gentry wrote that Ms. Sephus “has been declining since September. She has become \*14 more paranoid and confused... [speech] delayed; incoherent; minimal.” A 105.

On November 20, 2008, Ms. Sephus was found wandering the streets late on a cold night, wearing insufficient clothing. A 196. In the hospital emergency room, she was unable to give her name or address. A 195. After her family was located, Ms. Sephus was transferred to a locked ward at Goddard House, a residential nursing facility. A 188. At intake, she knew her first name only, not her last name, place, or date; she “could not follow commands and her verbal responses had little to do with the questions.” A 188. On November 25, she could not focus long enough to complete the MMSE. A 180. Goddard House staff noted: “Family seems surprise[d] by how advanced her dementia appears outside of her homebased setting.” A 193.

Ms. Sephus was transferred to another facility, Standish Village, in early 2009. She remained there until her death in June 2009.

## **B. Dr. Melanie Gentry**

Dr. Gentry was unavailable for trial, so the court admitted full transcripts of her deposition as exhibits. In deposition, she testified about her \*15 treatment of Ms. Sephus. She never saw Ms. Sephus alone, because “she seemed more comfortable with a family member present.” TT [1:61, 67, 72] 1038, 1044, 1049. However, the standard of practice for a forensic evaluation required meeting the patient alone. TT [1:106] 1083. The visits ranged from approximately one hour for the first visit to approximately 30 minutes for the remaining visits. TT [1:103, 122] 1080, 1099.

Ms. Sephus rarely spoke directly to Dr. Gentry. “I frequently addressed questions to Mrs. Sephus. Oftentimes if she did not have a response or was unsure - so oftentimes I would direct questions to Mrs. Sephus. She would respond, and then often Ethel Shepard would add additional information.” TT [1:104] 1081. Ms. Shepard and Ms. Sephus often contradicted each other; Ms. Sephus said she could manage her own affairs, whereas Ms. Shepard said that Oscar wrote the checks and Ms. Sephus signed them. TT [1:110] 1087.

Dr. Gentry testified that Ms. Sephus was not a reliable narrator. TT [1:101-102, 135] 1078-79, 1112. She told Dr. Gentry that she did not have any memory problems, but Dr. Gentry found that she did. TT [1:102] 1079. Ms. Sephus also told Dr. Gentry that she did not have any problems functioning independently but again, **\*16** Dr. Gentry found otherwise. TT [1:101] 1078. Both Ms. Shepard and Oscar Beverly regularly answered questions about Ms. Sephus' condition. TT [1:101-102, 135] 1078-79, 1112. For example, when asked who reported Ms. Sephus' ongoing memory problems, Dr. Gentry replied: “I assume it was Oscar since she [Ms. Sephus] did not tend to be very aware of her memory deficits.” TT [1:135] 1112.

When Dr. Gentry indicated in the records that Ms. Sephus was “coherent,” she used the term in a clinical sense. Dr. Gentry explained that she used “coherent” to mean “answers to questions generally make sense. They may not always be accurate, but the statement is sensible.” “I don't have trouble following what she's saying. There may be elements of it that seem implausible, but that doesn't mean it's confused in the telling.” TT [1:114-15] 1091-92. In other words, the content of an answer may be totally delusional, but if the sentence is clearly stated, it would be “coherent.”

In December 2007, at Ms. Shepard's request, Dr. Gentry agreed to write a letter concerning her ability to sign a health care proxy, power of attorney and will. TT [1:27] 1005. The letter was based upon her **\*17** previous two assessments of Ms. Sephus. TT [1:28] 1007. Dr. Gentry did not discuss the specifics of Ms. Sephus' estate plan with her before writing the letter. TT [1:32-33] 1009-10. Dr. Gentry admitted that she could not remember when she had discussed estate planning with Ms. Sephus. TT [2:7] 1130. Dr. Gentry stated that they discussed it somewhat at the first session back in August 2007, and that conversation may have been the only one she had with Mrs. Sephus on that matter. TT [2:7] 1130. Dr. Gentry also admitted that she had no training in forensic psychiatry, and was aware that the treating psychiatrist should not also serve in a forensic role. TT [1:30-31, 37] 1009-10, 1016. Dr. Gentry did not see Ms. Sephus at or around the time she signed the Trust documents. TT [2:22] 1001. She noted in April 2008 that Ms. Sephus was experiencing increased hallucinations, paranoia, and depressive symptoms. TT [2:18-19] 1141-42.

In November 2008, Ms. Sephus was “declining,” with more paranoia and confusion. TT [2:59-60] 1182-83. Ms. Sephus was admitted to the Beth Israel emergency room on the evening of the same day she saw Dr. Gentry. TT [2:60] 1183.

#### **\*18 C. Dr. John Daignault**

Dr. John Daignault, forensic psychologist, was the only expert witness in the case. Dr. Daignault testified that, “[t]o a reasonable degree of psychological certainty,” Ms. Sephus lacked testamentary capacity on the date the estate planning documents were executed. TT [1:130] 74.

Dr. Daignault explained that in evaluating the testamentary capacity of Ms. Sephus, he looked primarily at the medical records. TT [1:90-130] 44-74. He first examined the records of her treating physician, Dr. John Muse, the earliest recording of her deteriorating mental status.

In July 2006, a year before she was formally diagnosed with [Alzheimer's disease](#), Dr. Muse noted that Ms. Sephus had applied plaster to her face thinking it was makeup. TT [1:78-79] 22-23. Dr. Daignault opined that this was consistent with the memory loss and orientation of a person suffering from [dementia](#). TT [1:78-79] 22-23. In June 2007, Dr. Daignault noted that Oscar had reported that Ms. Sephus was hearing voices and seeing things, a common pathology of Alzheimer's patients.

**\*19** In July 2007, Dr. Muse indicated that Ms. Sephus believed that people were wearing her clothes and in the cabinets. This visit resulted in Dr. Muse referring her to Dr. Melanie Gentry for psychiatric evaluation. TT [1:81-82] 25-26.

Dr. Daignault opined that Dr. Gentry after evaluating Ms. Sephus found that she was significantly impaired in her ability to manage her **finances** and medical care and may be **exploited financially**. TT

[1:83] 27. He noted that “there is no evidence in the record that Dr. Gentry carried out a forensic assessment along the lines of what I’ve already testified to,” an exam that would allow Dr. Gentry to conclude that Ms. Sephus possessed testamentary capacity as set forth in her December 2007 letter. TT

[1:138] 82. Dr. Daignault further explained that any opinion expressed in December 2007 would, given the course of Ms. Sephus’ **Alzheimer’s disease**, “be entirely invalid. When the subject is available in a testamentary competence evaluation it must be a here and now assessment as close to the signing of the documents as possible. This hiatus of months renders it totally invalid, and Dr. Gentry acknowledges that.” TT [1:141] 85. Dr. Daignault also **\*20** explained that the results of a Mini Mental Status Examination (“MMSE”) at which Ms. Sephus exhibited poor recall and attention placed her in the moderate demented range for evaluations. “She did not know the year, she apparently didn’t know the season, she did not know the date, and she apparently did not know the day of the week...” TT [1:92] 36.

Dr. Daignault noted that by May 2008 when she was admitted to Massachusetts General Hospital (“MGH”), less than a year after the first MMSE, Ms. Sephus’ condition had deteriorated substantially to a state of severe **dementia**. TT [1:96-97] 40-41.

Dr. Daignault found that the hospital notes relating to the admission were significant. He read: “The patient denies problems with her memory and does not feel she has any problems functioning independently. Her niece reports at least a one to two year history of cognitive decline. She is often confused and unable to remember significant events. She often mixes up the past and present such as referring to her mother as if she is still alive...” TT [1:97] 41; A 122. Dr. Daignault noted that Ms. Sephus’ denial of memory problems was consistent with **Alzheimer’s disease**, because Alzheimer’s patients lack **\*21** an awareness of the extent of their mental illness. TT [1:98] 42.

He noted that Dr. Gentry had previously opined in her deposition that Ms. Sephus reported falsely that her memory was fine. TT [1:101] 45. This was consistent with the diagnoses and progression of **Alzheimer’s disease**. “That is the chief symptom of Alzheimer’s is this continued proceeding, progression of poor memory.” TT [1:105] 49.

Dr. Daignault also reviewed the May 2008 MGH notes, which reported that Ms. Sephus’ “baseline memory and executive function are poor. For example, she does not remember her family members’ names and refers to her son as ‘her.’ ... She lives at home with her 78-year-old brother who assists her with most ADLs.” TT [1:117] 81; A 200. Dr. Daignault explained that the term “baseline” means the usual level of function for the patient. TT [1:119] 63. It referred to “...the typical or usual course of her functioning. So here the patient’s niece is saying ... that her typical functioning level Miss Sephus is sitting around her home watching television. She does not cook, clean or shop. That would be consistent with what I just said about a score of eight on the MMSE, **\*22** that you have somebody who is severely impaired.” TT [1:119-21] 63-65.

In addition, Dr. Daignault referred to the contemporaneous notes of Mrs. Sephus’ occupational therapist, who reported that Mrs. Sephus required 24 hour supervision because of cognitive impairment due to Alzheimer’s. TT [1:123] 67.

In conclusion, Dr. Daignault opined:

To a reasonable degree of psychological certainty the data, the clinical data support an opinion that she did not possess testamentary capacity on March 10, 2008. She would be unable in my opinion to address those four spheres [understand what the document is, know what her **financial** assets are, know who her family and close friends are and her intent with respect to them, and express a rational intent to make the dispositional decision] because of her cognitive impairment. I look at the



bookends of particular importance in arriving at this conclusion. One is that prior to March 10, 2008, we have a course of deterioration that is supported by the medical records including a 14 out of 30 on MMSE putting her in the moderate demented range with a doctor who says she is significantly impaired... We see this continuing until D day, March 10, according to the records, and then on the other bookend after we see a month and a half later that she is at an 8 out of 30 which is now in the severe range of [dementia](#) at the Mass. General recod where she is unable to care for herself without 24-hour supervision.

TT [1:87-89, 130-131] 30-32, 74-75. Further, Dr. Daignault explained: "... [Ms. Sephus'] deteriorating course was ongoing, progressive and ended tragically... \*23 Given the data available, I am comfortable opining that to a reasonable degree of medical certainty [that Ms. Sephus lacked testamentary capacity.]" TT [1:177] 121.

#### D. Maurice Sneed

Maurice Sneed is a retired registered nurse and Ms. Sephus' niece; her mother Evelyn Blount was Ms. Sephus' sister. TT [2:16] 152. Ms. Sephus and Ms. Blount were the only girls in their family and about 5 or 6 years apart in age. TT [2:72-73] 208-09. Maurice described a close relationship with Ms. Sephus from her childhood. TT [2:24-31] 160-67. Maurice reported that after Ms. Sephus' husband died: "Betty was depressed, and she was kind of fearful that people were coming through the walls... and [she said] someone was stealing from her, and she was just acting depressed and weird." TT [2:34] 170.

In May 2005, Ms. Sneed fought with Oscar and he moved out of the house. TT [2:43] 179. Maurice, Ms. Sneed, Ms. Blount, Galen, Wesley, and Attorney Dilday held a family meeting to discuss Ms. Sneed's care. Id. After the meeting, Attorney Dilday drafted a power of attorney for Maurice. TT [2:44] 180. Ms. Sephus went to Virginia to visit Ms. Blount. TT [2:45] 181.

\*24 Maurice, Galen, and Ms. Blount returned Ms. Sephus to Boston in August 2005, and noted that Ms. Sephus wanted to return home and not move to assisted living. TT [2:49] 184. Ms. Sephus' room was "in disarray" and had "bad conditions" when they returned. TT [2:64, 183] 199, 319. After Ms. Sephus' return to Boston, Attorney Dilday called Maurice and said Ms. Sephus was revoking the power of attorney. TT [2:57] 192. Msaurice reimbursed herself \$12,280 from Ms. Sephus' account. TT [2:58] 193. This money was for clothing, food, hotels, and travel expenses for Ms. Sephus. TT [2:126] 262.

Maurice testified that from 2005-2008, Ms. Sephus had progressive [mental impairments](#); she was not able to wash herself well, understand [finances](#), or pay bills. TT [2:172-73] 308-09.

In May 2008, Maurice and her mother Evelyn purchased land from Oscar and Ms. Sephus because "Oscar wouldn't pay any taxes" and she worried that the land would be taken for tax delinquency. TT [2:176, 179, 181] 312, 315, 317.

#### E. Galen Sneed

Galen Sneed is the son of Maurice Sneed, and Ms. Sephus was his great-aunt. TT [3:10] 328. Galen \*25 remembers Ms. Sephus visiting his house and bringing gifts throughout his childhood. TT [3:12] 330. He visited Ms. Sephus' house in Boston at least five times. TT [3:13] 331. He observed that Ms. Sephus and Ms. Blount's interactions were always friendly, loving, and jovial. TT [3:17] 334. Galen also had a good relationship with his great-uncle Oscar. TT [3:19-20] 337-38. At Mr. Sephus' funeral, Galen noted that Oscar was "acting strange. he seemed happy that LD was dead." TT [3:23] 341.

In early 2005, Maurice asked Galen to go to Boston because Ms. Sephus was having an issue with Oscar. TT [3:26] 344. After Galen arrived, he heard Ms. Sephus arguing with Oscar, "telling him to get out and accusing him of stealing her money, and he was calling her crazy." TT [3:27] 345. Ms. Sephus "had some kind of delusion that [Oscar] could... come through the walls or he could come through the ceiling light, and it was a bit irrational." TT [3:30] 348. Galen had to cook Ms. Sephus' oatmeal because she couldn't use the stove, and she couldn't call friends on the phone. TT [3:29] 347. Galen noticed that Oscar had expensive personal items, despite the fact that he had no income. TT [3:50-51, 53] 368-69, 371. After Ms. Sephus \*26 visited Ms. Blount in Virginia, Galen noted that she was "strangely agitated" on the trip back and "seemed upset." TT [3:,44-45] 362-63.

Galen did not see Ms. Sephus again until 2008 when she lived at Standish Village; at that visit, she did not know Galen's name, talked about a big mean dog, and hit people with her cane. TT [3:47] 365.

#### **F. Charmin Beverly Gilliam**

Charmin Gilliam was Ms. Sephus' niece; her father was Ms. Sephus' sister. TT [3:82] 400. Ms. Sephus was “like a second mom” to Ms. Gilliam; Ms. Sephus gave her clothes, food, and Christmas presents. TT [3:83] 401. Ms. Sephus saw Ms. Gilliam every summer during her visits to North Carolina, and Ms. Sephus attended Ms. Gilliam's college graduation. TT [3:82, 84] 400,402. Throughout her adult life, Ms. Gilliam spoke to Ms. Sephus about 3 or 4 times per year, and saw her twice. TT [3:85-86] 403-04. After LD's death, Ms. Gilliam spoke to Oscar weekly about Ms. Sephus. TT [3:89] 406. She spoke to Ms. Sephus through the speaker phone at Ms. Blount's house when Ms. Sephus lived in Standish Village: “She said my father was down the room from her, and I know that couldn't be true because he was dead.” TT [3:91] 408.

#### **\*27 G. James Albert Beverly**

James Beverly was the nephew of Ms. Sephus; his father was Ms. Sephus' brother. TT [3:103] 421. As James was growing up, Ms. Sephus bought clothes for him and his siblings, visited them regularly, and paid to install plumbing at their family farm. TT [3:104] 422. If James ever got in trouble, Ms. Sephus would call and speak to him. TT [3:107] 425. James visited Ms. Sephus in Boston in the summer 1967 or 1968. TT [3:108] 426. The last time he saw Ms. Sephus was in 2000, at his son's funeral. *Id.* When Ms. Sephus and Ms. Blount were together, they were like “sisters, girlfriends... always joking... they carried on all the time.” TT [3:109] 427. Ms. Sephus always stayed with Ms. Blount when she visited. *Id.*

### **II. Respondents' Evidence**

#### **A. Attorney Alex Moschella**

Attorney Moschella, a partner at Moschella & Winston, prepared the Trust Documents for Ms. Sephus at Attorney Dilday's request. TT [3:126, 131] 441, 446. On October 24, 2007, Attorney Moschella met with Ms. Sephus, Oscar, and Attorney Dilday. TT [3:137] 451. He then spoke with Ms. Sephus alone. TT [3:137-38] 451-52. Attorney Moschella testified that each \*28 time he met with Ms. Sephus, she had full awareness and understanding of the estate plan and the documents. TT [3:143-44, 164, 178] 458-59, 479, 493. The goals of estate planning were to keep the house for Oscar, and avoid “problems” from Ms. Blount and Maurice. TT [3:150-51] 465-66. On cross-examination, Attorney Moschella could not explain why notes of his conversations with Mrs. Sephus which he stated he made during the meetings were in a different ink color from other notes he stated he made contemporaneously. TT [3:136, 213-214] 450, 528-29.

Ms. Sephus gave verbal permission for Attorney Moschella and Dr. Gentry to speak about her cognitive health. TT [3:148] 463. Attorney Moschella testified that he spoke at length with Dr. Gentry about Ms. Sephus' mental capacity; however, Dr. Gentry stated she never spoke with Attorney Moschella. TT [3:155-58, 229] 470-473, 544; TT [2:23] 1146. Attorney Moschella did not know that Dr. Gentry was Ms. Sephus' treating psychiatrist. TT [3:190, 233] 505, 548. He was unaware of basic facts about Ms. Sephus' treatment, such as whether she suffered delusions or hallucinations, and whether she was a reliable reporter. TT [3:229-231, 258] 544-46, 573.

\*29 Attorney Moschella admitted that, had he known that Ms. Sephus was suffering from Alzheimer's late onset with delusions, he would have wanted more information and may have sent her for a second consult. TT [3:253] 568. Attorney Moschella noted that Alzheimer's patients can be “in and out of distrusting someone who is close to them. It's very common with certain forms of Alzheimer's that that behavior is manifested.” TT [3:268] 583. Further, Alzheimer's patients “can turn against the most caring, loving person in the family,” and it is possible that Ms. Sephus turned against Ms. Blount in this way. TT [3:269] 584.



## B. Ruth Cherenfont

Ms. Cherenfont worked as Attorney Moschella's legal assistant at the time Ms. Sephus executed the Trust Documents. TT [3:276] 591. She remembers Ms. Sephus, Oscar, Attorney Dilday, and Ms. Shepherd specifically because "they were one of the only black clients that came to Moschella & Winston." TT [3:277] 592. Ms. Cherenfont served as the witness for Ms. Sephus' health care proxy, and testified that Ms. Sephus "knew what she was signing." TT [3:279] 594. On cross-examination, Ms. Cherenfont disclosed that this \*30 opinion was based solely on the following conversation with Ms. Sephus: "I probably said 'Hi, how are you' when entering the room..." and Ms. Sephus responded "Hi" back. TT [3:284] 599.

## C. Oscar Beverly

Oscar Beverly was Ms. Sephus' and Ms. Blount's younger brother.<sup>2</sup> TT [4:7] 602. When Oscar was eight years old, his mother died and Ms. Sephus took over his care. TT [4:11-12] 606-07. Oscar continued to rely on Ms. Sephus for support throughout his life, even after she moved to Boston. TT [4:12] 607. In 2002, he permanently moved in with Ms. Sephus to help care for her husband Lawrence Durant ("L.D."), who had [Parkinson's disease](#). TT [4:13] 608. After L.D.'s death in 2004, Oscar continued living with Ms. Sephus and helping her with daily tasks. TT [4:15] 610.

Oscar described his relationship with Ms. Sephus between February-August 2005 as "estranged." TT [4:16]

611. He moved out of the house, and Ms. Sephus took a trip to Virginia to stay with Ms. Blount. TT [4:17]

612. When Ms. Sephus returned to Boston, Oscar visited her regularly until they reconciled and he moved back \*31 in. TT [4:19] 614. He did not ask about Ms. Sephus' trip to Virginia and she did not volunteer details. *Id.*

Oscar repeatedly denied making statements to Ms. Sephus' doctors or even being in the room with Ms. Sephus during doctor's visits, despite multiple references to his presence and statements in the medical records. *See, e.g.*, TT [4:24, 61-63, 70, 140-141, 146, 153, 161, 166] 619, 655-57, 665, 734-35, 740, 748, 756, 761. Although he lived with Ms. Sephus and saw her daily, he testified that he never noticed any changes in Ms. Sephus' mental state: "I really didn't focus in on whether or not she was struggling mentally or not, to tell you the truth." TT [4:25-26] 620-21. He "had no reason" to notice Ms. Sephus' poor memory. TT [4:159] 754. Oscar minimized the incident where Ms. Sephus was wandering the streets, suggesting that she had merely locked herself out. TT [4:41-42] 636-37. Although MGH records indicated Ms. Sephus' family knew of her Alzheimer's diagnosis, Oscar testified: "I wasn't aware of that... it certainly didn't include me." TT [4:168] 763.

Oscar denied using Ms. Sephus' money, stating: "I didn't want to get involved in her [finances](#). I had \*32 mine to take care of." TT [4:26] 621. He further said that Ms. Sephus never accused him of taking money, "I never took her money wrongfully." TT [4:46] 641. However, as Ms. Sephus' mental health continued to deteriorate, Oscar informally took control of her [finances](#) in 2006. TT [4:77] 672. On cross-examination, he admitted having access to both of Ms. Sephus' ATM cards. TT [4:49] 644. He also admitted that Ms. Sephus did not use her ATM cards. TT [5:99] 849. Although he repeatedly asserted that he almost never took money for his own benefit, see generally TT [4:54-64, 77-139] 649-59, 672-734, he later admitted that beginning in the summer of 2006, he withdrew an average of \$100 per week from Ms. Sephus' Sovereign Bank account. He stated that he would take money from the account or the ATM card and give her cash from his own account. TT [4:55-56] 650-51. He subsequently admitted that some of the cash withdrawals were for his personal use, and that Ms. Sephus confronted him about it. TT [5:91-93] 834-36. On one occasion, he bought a computer using Ms. Sephus' ATM card, and "might have forgot to" reimburse Ms. Sephus. TT [4:120-21] 715-18. Oscar's regular cash withdrawals continued after Ms. \*33 Sephus' death, and totaled in the tens of thousands of dollars. TT [4:70, 84, 137] 665, 679, 732; A 378.

## D. Attorney James Dilday

In 2007, Ms. Sephus' friend and attorney, James Dilday, recommended that she do Medicaid planning. A 387; TT [5:30] 773. Attorney Dilday arranged for Ms. Sephus to see Alex Moschella, an **elder** law attorney. TT [5:30-31] 773-74. Attorney Dilday testified that while he had served as Ms. Sephus' attorney in the past, he was not involved in creating the Trust documents because he did not have the knowledge and expertise to do so. TT [5:39, 44] 782, 787. He was surprised to learn that he would be a beneficiary of the Trust at the first meeting with Attorney Moschella. TT [5:35] 778. Attorney Dilday believed, but was not certain, that he held a power of attorney for Ms. Sephus; the document itself could not be found. TT [5:47-49] 790-92. He received a \$5,500.00 check from the Trust for legal fees on January 7, 2009. TT [5:61] 804. Attorney Dilday could not remember what work this check represented or his hourly rate. TT [5:62-65, 73] 805-09, 816.

Attorney Dilday knew Ms. Sephus since he was a small child. TT [5:24] 767. He viewed her as a **\*34** “surrogate mother” and respected her. TT [5:26] 769. Attorney Dilday testified that Ms. Sneed “always” accused Oscar of stealing from her, that sometimes she gave him money voluntarily and sometimes he would take it. TT [5:68-69] 811-12.

### **E. Ethel Shepherd**

Ethel Shepherd's mother was Ms. Sephus' cousin. TT [5:104] 847. Ms. Shepherd first met Ms. Sephus when she was ten years old, and her family stayed with Ms. Sephus when they first moved to Boston. TT [5:103-04] 846-47. After LD's death, Ms. Sephus started calling Ms. Shepherd her “niece,” forgetting people's names, and mixing up her brothers' names. TT [5:105-06] 848-49. Ms. Shepherd accompanied Ms. Sephus to medical appointments to make sure she got there and make sure the doctor got accurate information. TT [5:110-11, 157] 853-54, 900. Ms. Shepherd was Ms. Sephus' health care proxy from the time the Trust document were signed until the end of her life. TT [5:126, 143] 869, 886. Ms. Shepherd testified that while she was present during Dr. Gentry's sessions with Mrs. Sephus, she did not remember any discussion about **dementia** diagnoses. TT [5:112, 114] 855, 857. She also could not remember making statements which medical staff at MGH had **\*35** recorded her making. TT [5:156] 899. Ms. Shepherd said that “she knew [Ms. Sephus] was coherent up until her death and that they were able to engage in full conversations. TT [5:140, 161] 883, 904.

On cross examination, Ms. Shepard admitted that the medical records were accurate, but “not the total picture” of Ms. Sephus' health. TT [5:154] 897. When then asked about her reported statements regarding Ms. Sephus' baseline condition, Ms. Shepard stated that she did not remember making those statements, but “if they asked those questions, I probably made that statement.” *Id.*

## **ARGUMENT**

### **I. Standard of review**

This Court reviews the trial court's findings for clear error. *See, e.g., Goodman v. Atwood*, 78 Mass. App. Ct. 655, 658 (2011), and *In re Estate of Sharis*, 83 Mass. App. Ct. 839, 842 (2013). “Findings are clearly erroneous when, ‘although there is evidence to support [them], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’” *Goodman*, 78 Mass. App. Ct. at 657-658, quoting *Building Inspector of \*36 Lancaster v. Sanderson*, 372 Mass. 157, 160 (1977) (*internal citation omitted*).

### **II. The trial judge's decision that Ms. Sephus had testamentary capacity when she executed the Trust Documents was contrary to the weight of the evidence.**

#### **A. The judge erred in applying the burden of proof for testamentary capacity, because she failed to conduct the necessary burden-shifting analysis.**

When Complainants presented evidence of mental incapacity through medical records and an expert forensic psychologist, the judge should have shifted the burden of proof to the Respondents to rebut that evidence.

In general, a testator is presumed competent; however, once evidence casts doubt on testamentary capacity, the burden of proof shifts to the other party to prove that the testator had capacity. *See, e.g., O'Rourke v. Hunter*, 446 Mass. 814, 827 (2006); *Maimonides Sch. v. Coles*, 71 Mass. App. Ct. 240, 252 (2008). An unwise disposition of the estate does not prove incapacity. *Cushman v. Nichols*, 20 Mass. App. Ct. 980, 982 (1985).

To have the requisite capacity, the testator must 1) have “a general comprehension of the nature of making a will,” and 2) “understand ‘the nature and \*37 situation of his property and [her] relations to those persons who would naturally have some claim to [her] remembrance.’” *Palmer v. Palmer*, 23 Mass. App. Ct. 245, 250 (1986), quoting *Goddard v. Dupree*, 322 Mass. 247, 250 (1948).

In *Maimonides*, uncontested medical records, personal observations of multiple professionals and individuals, and testimony of friends and family all showed that the testator was thinking clearly and understood his decisions. *Maimonides Sch.*, 71 Mass. App. Ct. at 252-253. Here, in contrast, plentiful evidence showed the opposite. Medical records, expert testimony, and witness testimony all show that Ms. Sephus had been suffering from longstanding mental impairments on the date she executed the trust documents. In the face of this significant evidence, the judge never conducted the proper balancing analysis.

Ms. Sephus had significant cognitive impairments at the time she executed the trust documents. A diagnosis of *Alzheimer's disease*, along with cognitive deficits that affect abilities, can show a lack of testamentary capacity. *Paine v. Sullivan*, 79 Mass. App. Ct. 811, 818 (2011). In *Paine*, the testator was \*38 unaware of his poor judgment, needed supervision at all times, and was too “confused” to handle his finances. *Id.* This evidence was sufficient to rebut the presumption of testamentary capacity. Similarly, Ms. Sephus needed help with her finances since at least 2004-2005, could not live alone, was diagnosed with *Alzheimer's disease*, had severe memory deficiencies of which she was unaware, suffered from delusions and hallucinations and needed assistance at all her medical appointments.

Despite this showing, the trial judge concluded that there was insufficient evidence to rebut the presumption of capacity. (OP 43) This was clearly contrary to applicable law.

## **B. The trial judge discounted medical records from multiple sources spanning a period of years.**

The trial judge ignored significant medical evidence and expert testimony in making her decision. “In Massachusetts only ‘the witnesses to the will, the [treating] physician,... and witnesses who by special skill and experience are qualified as experts in the knowledge and treatment of mental diseases... [may] give their opinions’ of testamentary capacity.” *May v. Bradlee*, 127 Mass. 414, 421 (1879), quoted in \*39 *Maimonides Sch.*, 71 Mass. App. Ct. at 250, n.8. Here, the trial judge discounted the treating physician's notes and the expert witness' opinion, focusing solely on testimony from the witnesses to the Trust documents and the Respondents, who were lay witnesses and beneficiaries of the estate.

A trial judge may assign various weights to the evidence. *See, e.g., Nichols v. Sullivan*, 340 Mass. 783, 783-784 (1959) (judge could rightly conclude that testimony showing weakening of body and mind, was of substantially less weight than testimony of attending physicians and the decedent's attorneys). However, here the trial judge discounted expert testimony and substantial medical records from the treating physicians, detailing Ms. Sephus' long history of *dementia* and memory loss. Instead, she credited only the decedent's attorney's testimony. Denying the weight of such compelling evidence is clear error.

The trial judge rejected or discounted the following critical medical evidence.

Dr. Gentry testified that during the time she was Ms. Sephus' treating psychiatrist her memory was poor. She testified that despite believing her memory was fine, Ms. Sephus was unaware of her memory \*40 deficiencies. TT [1:135] 1112. Similarly to the testimony of Dr. Daignault, Dr. Gentry opined that lack of understanding of one's mental deficiencies is “very common in things like *Alzheimer's disease*. TT [1:136] 1113. She never saw Ms. Sephus alone and Dr. Gentry admitted that Ms. Shepard

provided a lot of information because Ms. Sephus was unsure of the answers to questions. TT [1:104-105] 1081-82. Ms. Sephus was not very talkative. TT [2:17] 1140.

While the trial judge credits Dr. Gentry's notes from December 18, 2007, that Ms. Sephus was engaged in estate planning with her attorney, she failed to address Dr. Gentry's testimony that Ms. Sephus did not speak much during their sessions, that much information came from Ms. Shepard or from Oscar, and that when Ms. Sephus did speak she was an unreliable narrator.

Nor did she take into account that Dr. Gentry's opinion was given long before the Trust documents were signed. The December 13, 2007 opinion letter was based upon Dr. Gentry's impressions from the earlier July 19, 2007 initial visit and October 23, 2007 follow-up visit. Dr. Gentry did not see Ms. Sephus again until December 18, 2007, after she had written the letter. \*41 Dr. Gentry's most proximate visit occurred nearly five months before, and her opinion letter was written almost three months before, the Trust documents were actually signed. The trial judge failed to address Dr. Daignault's expert opinion that such an opinion was "entirely invalid." TT [1:141] 85.

While the trial judge conceded that Ms. Sephus may well have lacked testamentary capacity by May 18, 2008 when she was admitted to MGH, she reached the inconsistent conclusion that there was no credible evidence that Ms. Sephus lacked capacity just two months earlier. This conclusion was made in the face of the May MGH records from Ms. Sephus' treating physician, occupational therapist and physical therapist that Ms. Sephus's severe [dementia](#) was not a fluke, but rather her condition at baseline. A 200, 407. Her baseline memory and executive function were described as "poor," and her diagnosis was "Alzheimer's with paranoia and delusions." A 200.

MGH records stated that Mrs. Sephus "is not a clear historian" and that she was assisted in the interview by her "niece," Ms. Shepard. A 199. The records further stated that "Her family members think she may be slightly more confused than usual, but that \*42 she is has [sic] significant cognitive impairment at baseline." *Id.* MGH records reported that Mrs. Sephus was "saying words staff unable to comprehend. Upon arrival at unit, patient was pulling on things, phone, call light, putting on and taking off clothes, sitting up and hanging on rails." A 210-11. MGH records noted: "At her functional baseline, according to pt's niece, the patient sits around her home watching television. She does not cook, clean, or shop. It is unclear if she is able to bathe herself; she does not let her brother assist her with this." A 200. Ms. Sephus did not know who family members were; did not know the date, month or year's could not spell words or count backwards; and could respond only to simple commands. *Id.* MGH records indicated the following information provided by Mrs. Sephus: "In the last week, she has had less interest in spending time with her son, whom she sees daily's she does not remember her family members names and refers to her son as 'her'." *Id.* Mrs. Sephus did not have any children. TT [2:19] 155.

The trial judge appeared to attribute these severe symptoms to the fact that Mrs. Sephus was suffering from vertigo and extreme nausea, but the trial judge cited no medical authority for her lay \*43 conclusion. Further, this attribution contradicts Dr. Daignault's testimony and the MGH medical records, which noted that Ms. Sephus' mental state was impaired at baseline.

For these reasons, the trial judge's conclusion that "The evidence presented by Complainants at trial was insufficient to rebut the presumption that Mrs. Sephus possessed testamentary capacity on March 10, 2008" was clear error.

### **C. The trial judge failed to credit the sole expert testimony in the case, which showed that Ms. Sephus lacked testamentary capacity.**

Expert testimony can aid the trial court in interpreting medical records. In *Maimonides*, the challengers relied on testimony of an expert who had never met the decedent. However, the medical records in that case showed "at most... physical ailments and related depression," which was insufficient to show incapacity. *Maimonides Sch.*, 71 Mass. App. Ct. at 253 (*internal citations omitted*). Here, Ms. Sephus' medical records showed a diagnosis of [Alzheimer's disease](#) with [dementia](#) as early as July 2007. The expert, Dr. Daignault, testified that Alzheimer's is a progressive disease that causes ongoing cognitive decline. TT [1:145, 147, 175] 89, 91, 119. His \*44 testimony explained the significance of Ms. Sephus' test results and the progress of her disease.

TT[1177] 121. This information was consistent with the medical records, and supported the contention that Ms. Sephus did not have the requisite testamentary capacity.

Dr. Dagnault's testimony about the nature of [Alzheimer's disease](#) was also probative as to Ms. Sephus' capacity on the day she executed the estate planning documents. According to caselaw, a person generally lacking in capacity may have a lucid moment of testamentary capacity. *Maimonides Sch.*, 71 Mass. App. Ct. at 252; *Dunphy, Probate Law and Practice* § 23.4, at 437 (2d ed. 1997). Because there is no medical evidence from the exact date of the Trust execution, Dr. Dagnault focused on two “bookends” of appointments before and after the date. He explained that Ms. Sephus' cognitive abilities would have declined progressively. TT [1:127] 71. By the second bookend, Dr. Dagnault testified, it was impossible that Ms. Sephus could have had testamentary capacity. TT [1:203] 147. And based on the first bookend, Dr. Dagnault was reasonably certain that Ms. Sephus \*45 lacked capacity on the date she executed the Trust. TT [1:177] 121.

The trial judge also ignored Dr. Dagnault's testimony that Attorney Moschella's observations were inconsistent with medical records and “our knowledge of the progression of [Alzheimer's disorder](#).” TT [1:135-136] 79-80. Dr. Dagnault further testified that Attorney Moschella's notes that Mrs. Sephus was clear and accurate were not reasonably possible. “Anything is possible, but I am a forensic psychologist, I am a scientist, and I work in the world of reasonable likelihood based upon our knowledge of the course of a disease and the clinical data of the patient's mental status at the point of concern.” TT [1:136] 80. The trial judge presents no scientific evidence to rebut this opinion but simply rejects on the ground that she found Attorney Moschella credible and on the erroneous ground that medical records indicated that Mrs. Sephus was “coherent.”

Finally, the trial judge simply ignored Dr. Dagnault's testimony that Dr. Gentry's December 2007 letter opinion to Attorney Moschella was unreliable, because it was not based upon a forensic assessment. Dr. Dagnault explicitly stated that the letter was \*46 not the product of a valid forensic examination. TT [1:90] 34. He further testified that the December 2007 opinion letter was “entirely invalid” as to whether Ms. Sephus had testamentary capacity in March 2008. Dr. Dagnault based his opinion on his knowledge of the course of Mrs. Sephus' disease and the fact that she could have been assessed at or near the time she executed the Trust documents. TT [1:141] 85. In sum, the trial judge discounted the expert testimony based upon a misunderstanding of medical terminology and wrongly credited Respondents' witness testimony even though it clearly contradicted the medical evidence and statements of Respondents to Mrs. Sephus' treating professionals.

#### **D. The trial judge's evidentiary determination was based on a misunderstanding of medical terminology.**

Medical records noting that Ms. Sephus was “coherent” were wrongly interpreted with regard to the judge's finding of testamentary capacity. The judge incorrectly understood the meaning of the term “coherent” in a medical use. In the medical context, “coherence” is defined as follows: “(in psychology) the logical pattern of expression and thought evident in the speech of a normal, stable individual.”

\*47 Coherent. Mosby's Medical Dictionary, 8th edition. (C) 2009, Elsevier. Significantly, this definition deals only with speech patterns, not with content. When Dr. Gentry wrote that Ms. Sephus appeared “coherent,” she meant that Ms. Sephus was talking in appropriate grammar and speech patterns. See TT [1:114-15] 1091-92

(“[A]nswers to questions... may not always be accurate, but the statement is sensible.” “There may be elements of [the answers] that seem implausible, but that doesn't mean it's confused in the telling.”). Dr. Gentry testified that a statement is coherent even if it delusional so long as it is told clearly. TT [1:114-115] 1091-92. For example, a statement that “my mother is alive and at home” would be coherent even though the mother is, in fact, deceased. TT [1:115] 1092.

This is consistent with Ms. Sneed's testimony on cross-examination, “She could talk... I said she could not converse. That does not mean she couldn't talk. I mean, she talked, ‘How are you doing,’ we would say how are you doing, whatever, and she would talk about Wesley and she would talk about her brother.” TT [2:108-09] 244-45.



\*48 The judge relied upon her misunderstanding of the term coherent to discount Dr. Daignault's expert testimony. In fact, this was the key finding in her reasoning crediting respondents' witnesses' testimony and discrediting complainants' witnesses' testimony. A 407. This mis-reliance tainted the judge's reasoning and legal conclusions. The judge simply did not understand that a coherent statement could well be delusional or false.

The trial judge erred in rejecting clear medical evidence from the medical records.

#### **E. The trial judge erred in applying the legal standard for undue influence.**

Since at least 2005, Ms. Sephus, **elderly**, frail, and suffering from dementia, relied on her younger brother Oscar Beverly to handle her **finances**. "While the burden of proof ordinarily rests with the party contesting the will, a 'fiduciary who benefits in a transaction with the person for whom he is a fiduciary bears the burden of establishing that the transaction did not violate his obligations.'" *Cleary v. Cleary*, 427 Mass. 286, 295 (1998), quoted in *Sharis*, 83 Mass. App. Ct. at 842-843. Here, Oscar Beverly acted as a fiduciary, because he exercised complete control over \*49 Ms. Sephus' **finances**. In the course of doing so, he used her ATM cards regularly for his personal expenses and withdrew substantial amounts of money from Mrs. Sephus' account, "over time totaling in the tens of thousands of dollars." The trial judge addressed neither Oscar's status as a fiduciary, or his burden to rebut the allegation of undue influence. Her findings only considered Attorney Moschella. Order p. 38-39, ¶ 190-91.

The trial judge glossed over Oscar's behavior. Instead, the court found two significant transactions with respect to appellant Maurice Sneed. First, the court was "troubled" that Ms. Sneed reimbursed herself \$12,280.00 for expenses she incurred while Ms. Sephus was staying with her. Order p. 20, ¶ 36-40. Second, Ms. Sneed bought a piece of real estate from Ms. Sephus after she executed the Trust documents. The court found that "either: (1) Ms. Sneed believed that Mrs. Sephus was capable of entering into a real estate transaction through May 13, 2008; or that, 2) Ms. Sneed was knowingly taking advantage of Mrs. Sephus on May 13, 2008." Order p. 32, ¶ 137. While these facts may reflect on credibility, they have no relevance to the legal issues at stake. Ms. Sneed was not acting as \*50 a fiduciary to Ms. Sephus at the time of the real estate transaction, and nobody has alleged that Ms. Sneed exerted undue influence over Ms. Sephus. The legal standard for capacity to contract differs than the standard for testamentary capacity. See *Krasner v. Berk*, 366 Mass. 464, 467 (1974), and *Sutcliffe v. Heatley*, 232 Mass. 231, 232-233 (1919) (contracting requires capacity to conduct business, to understand the nature and quality of the transaction, and to grasp its significance). Further, these two items have no bearing on whether Oscar exercised undue influence over Ms. Sephus, or whether Ms. Sephus possessed testamentary capacity on the date she executed the Trust documents.

The trial judge failed to conduct the analysis of undue influence with respect to Oscar. Elements of undue influence are: "that an (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means." *Maimonides Sch.*, 71 Mass. App. Ct. at 255-256, O'Rourke, 446 Mass. at 828, quoting from *Tetrault v. \*51 Mahoney, Hawkes & Goldings*, 425 Mass. 456, 464 (1997). Here, Oscar had complete control over Ms. Sephus' **finances** since roughly 2005, making Ms. Sephus susceptible to his influence and providing Oscar with an opportunity to exercise that influence. Ms. Sephus' disposition was unnatural, in that it disinherited relatives with whom she had been close for her entire life.

Oscar did, in fact, use his influence to gain control of Ms. Sephus' estate. "In many instances a finding of undue influence rests largely on circumstantial evidence, since direct evidence of such influence is often difficult to establish." *Maimonides Sch.*, 71 Mass. App. Ct. at 256, quoting *Miles v. Caples*, 362 Mass. 107, 112 (1972); *Sharis*, 83 Mass. App. Ct. at 845. The evidence must provide "a solid foundation of established facts" that is more than "mere suspicion, surmise, or conjecture." *Maimonides Sch.*, 71 Mass. App. Ct. at 255-256, quoting *Neill v. Brackett*, 234 Mass. 367, 370 (1920). Here, Oscar tried to hide the fact that he had taken thousands of dollars from Ms. Sephus while she was alive. See [4:54-64, 77-139] 649-59, 672-734. He denied making statements documented in Ms. Sephus' medical records.

\*52 See, e.g., TT [4:24, 61-63, 70, 140-141, 146, 153, 161, 166] 619, 655-57, 665, 734-35, 740, 748, 756, 761. Therefore, clear evidence exists of Oscar's influence over Ms. Sephus.



### III. The trial judge improperly awarded attorney's fees to Respondents/Appellees.

The trial judge awarded attorney's fees to Respondents/Appellees despite lacking cause to do so. An award of attorney's fees in an estate challenge is governed by [M.G.L. c. 215, Section 45](#) as interpreted by *In re King*, 456 Mass. 796 (2010). The Supreme Judicial Court held that, while the fee shifting language of [Section 45](#) encompasses more than bad faith and wrongful conduct, the award of fees is still circumscribed by the "...usual American rule against an automatic award of fees to the prevailing party, and require[s] a reason, grounded in equity, why an award shifting fees should be made." *King*, 456 Mass. at 827. Relevant considerations include the presence or absence of bad faith, the conduct of the plaintiff party, and the possibility that a refusal to shift attorney's fees would distort the decedent's estate plan. *Id.* at 826-27. None of these considerations apply here.

**\*53** The trial judge based her award of attorney's fees on two grounds, which she later clarified to three. First, that there was no evidentiary support for the claim of undue influence or testamentary incapacity; second, that Appellants/Complainants did not depose Attorney Moschella before trial; and third, that Ms. Sneed purchased land from Ms. Sephus on May 13, 2008. *See Order on Respondents Motion for an Award of Attorneys Fees*, Oct. 25, 2013, and *Order and Memorandum of Decision on Attorneys Fees*, Oct. 10, 2014. As described above, Appellants/Complainants did present evidence to support a claim of undue influence and testamentary capacity, including medical records from Ms. Sephus' treating physician and psychiatrist, hospital records reflecting Ms. Sephus' mental state, and opinion testimony from an expert forensic psychologist. The medical records contained statements from the Appellees/Respondents themselves. The trial judge found that evidence unconvincing. However, it exists, and so Appellants/Complainants should not be sanctioned for bringing unfounded claims. Second, the trial judge seems to assume that Appellants/Complainants would have altered their trial strategy had they known the exact contents of Attorney **\*54** Moschella's expected testimony. This assumption is unfounded and incorrect.

The final ground is the real estate transaction between Maurice, Ms. Sephus, Evelyn, Oscar and Ms. Sneed. While this may bear on Ms. Sneed's credibility, it does not bear relevance to whether Ms. Sephus had testamentary capacity on the date she executed her estate planning documents. There has been no allegation that Ms. Sneed exerted undue influence over Ms. Sephus. The trial judge's view of the morality of this transaction should not affect the outcome of the case. Ms. Sneed testified that at the time of the transaction, she was not thinking about Ms. Sephus' competency to contract; however, upon reflection, she realized that Ms. Sephus was incapacitated. TT [2:177-78, 182] 313-14, 318.

Further, there is no evidence of bad faith by Ms. Sneed, who testified that she was trying to protect the property from tax delinquency: "I think that my main concern [was] that someone not pay and that it would be taken from the family for unpaid taxes." TT [2:179] 315. To find that this one peripheral transaction undermines the motivation for the lawsuit is an overreach. The question at trial was not the **\*55** propriety of this real estate transaction; it was whether Ms. Sephus had testamentary capacity at the time she signed the estate planning documents.

### CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court overturn the disposition below, grant judgment to Appellants, and reverse the orders awarding attorney's fees.

#### Footnotes

- 1 Where two parties have the same last name, first names are used for clarity. No disrespect is intended.
- 2 According to information received from counsel for the Respondents/Appellees, Oscar Beverly died on February 9, 2015.